Supreme Court, U.S.
FILED
SEP 2 2 2003
OFFICE OF THE CLERK

No. 03-73

IN THE

# Supreme Court of the United States

DONALD H. CARLSON, WARREN HART, GERARD HASKINS, STEPHEN R. LIBBY, EARL WEESE, AND LYLA C. WEESE, INDIVIDUALLY AND AS CLASS REPRESENTATIVES ON BEHALF OF ALL PERSONS SIMILARLY SITUATED,

*Petitioners,*

v.

STATE OF ALASKA, COMMERCIAL FISHERIES ENTRY COMMISSION,

*Respondent.*

**On Petition for Writ of Certiorari to the Supreme Court of Alaska**

## REPLY FOR PETITIONERS

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## REPLY FOR THE PETITIONER

The State of Alaska does not dispute Petitioners' showing (Pet. 11-26) that the decision below raises important and far-reaching questions about the constitutionality of the Alaska commercial-fishing-license-fee scheme, which provides a naked preference to local *commercial* fishermen who seek to fish in Alaska's bountiful waters. Instead, the State (i) urges that the constitutional rulings are insufficiently final to be reviewed (despite the Alaska Supreme Court's unequivocal statements that these constitutional questions have been "addressed" and "reaffirmed," and would not be "revisit[ed]," Pet. App. 14a, 24a); (ii) endorses the Alaska court's rulings that the Commerce Clause has no application whatsoever to a fee admittedly imposed, disproportionately, on out-of-state *commercial* fishermen; and (iii) proclaims that the Alaska court properly devised a formula for calculating a constitutionally permissible fee differential based on fisheries-related expenditures from state oil revenues "attributable" to state residents. The State is wrong on every count.

1. **The constitutional questions presented are final.** Alaska suggests (Opp. 8) that the constitutional rulings made by the Alaska court do not reflect a "final judgment" under 28 U.S.C. § 1257, because *Carlson III* "did not finally rule on the ultimate question the case raises—the constitutionality of the state's resident-nonresident fee differential." Unqualified language in the Alaska court's opinion directly contradicts the State's position: "The constitutionality of charging nonresidents more for commercial fishing licenses and permits has already been addressed, first in *Carlson I* and then reaffirmed in *Carlson II*." Pet. App. 14a. And, despite Petitioners' efforts to convince the Alaska Supreme Court of its prior errors, the court in *Carlson III* found "no reason to revisit [the] decision in *Carlson II*." Pet. App. 24a. It would be remarkable indeed if the Alaska Supreme Court had not reached a final decision on these constitutional issues

after nearly 20 years of litigation and *three* opportunities for review by that court.

All that is left for the state trial court is the calculation of damages. *See* Pet. App. 25a-26a ("We leave to the superior court on remand to determine whether proportionality exists in any particular instance and whether a refund is due."). Contrary to Alaska's suggestion (Opp. 10), that refund calculation will have no bearing on the constitutional questions presented by the petition: Even if application of the *Carlson II* formula were to result in a finding that the fee differential was unconstitutional in part under the Privileges and Immunities Clause (and that a refund was due the class members), Petitioners' claims that the fee differential should be invalidated altogether under the Commerce Clause, and that the Alaska court's formula for determining compliance with the Privileges and Immunities Clause is constitutionally flawed, would remain. Thus, this is a case "in which the federal issue, finally decided by the highest court in the State, will survive and require decision regardless of the outcome of future state-court proceedings." *Cox Broad. Corp. v. Cohn*, 420 U.S. 469, 480 (1975); *see also, e.g.*, *Radio Station WOW v. Johnson*, 326 U.S. 120 (1945).

2. **Whether the Commerce Clause applies to the Alaska commercial-fishing-license scheme warrants this Court's review.** Petitioners showed (Pet. 11-17) that there is no justifiable basis for the Alaska court's holding that discriminatory fees for commercial fishing licenses issued to out-of-state fishermen are not limited by the Interstate Commerce Clause. The State nonetheless defends the Alaska court's judgment by drawing an artificial and untenable line between "the selling of fish" on the one hand, which the State concedes is restricted by the Commerce Clause, and the harvesting of fish by commercial fishermen in Alaska's waters—which the State says does not even implicate the Commerce Clause (Opp. 11), despite the fact that out-of-state fishermen cannot engage in that activity absent the payment of a discriminatory surcharge.

The State's position strains credulity: For one, it is difficult to imagine a nonresident commercial fisherman whose commercial endeavors are unaffected by Alaska's requirement that he pay a significantly higher fishing license fee than his in-state competitors simply because he is a nonresident. Indeed, the brief submitted by *amicus curiae* The Tangier Sound Waterman's Association makes clear that discriminatory nonresident surcharges like Alaska's "are a common burden and often a total barrier for [nonresident] commercial fishermen." *Amicus* Br. at 3.

For another, the State's argument (Opp. 13-14) that the Commerce Clause does not apply until the fish are removed from the ocean is, like the Alaska court's ruling, based on discredited precedent. The State fails to address Petitioners' showing (Pet. 13) that the Alaska court's repeated reliance (Pet. App. 103 n.4; *see also* Pet. App. 60a n.8) upon the statement in *Toomer v. Witsell*, 334 U.S. 385, 394-95 (1948), that the Commerce Clause is not violated when "the taxable event . . . occurs before the [article] can be said to have entered the flow of interstate commerce," is no longer good law, because the authorities it relied upon to reach that holding "ha[ve] been undermined by more recent cases." *Commonwealth Edison Co. v. Montana*, 453 U.S. 609, 614 (1981). Instead, the State leans on language in *Foster-Fountain Packing Co. v. Haydel*, 278 U.S. 1 (1928), a case involving shrimping in Louisiana, for the proposition that "the protection of the commerce clause attaches at the time of the taking" and not until then. *Id.* at 13. But that proposition—expressed only slightly differently than in *Toomer*—was interred by *Commonwealth Edison*, as explained in the petition (Pet. at 13). Nor is the Opposition's reliance on the dissent in *Geer v. Connecticut,* 161 U.S. 519 (1896), availing. *Hughes v. Oklahoma*, 441 U.S. 322 (1979), overruled *Geer* and laid to rest the fiction that the state owns the natural resources within its borders in its sovereign capacity, and thus can condition the possession of wildlife on its remaining within the state. *Id.* at 327. *Hughes*' approval

of the dissent in *Geer* extended only to the proposition that the state could not limit interstate commerce in a natural resource *even after it had been reduced to possession*. *Id.* at 329. The question whether the Commerce Clause applies to a natural resource found within the state *before* its reduction to possession was not at issue in *Geer*; that question was answered in the affirmative by *Commonwealth Edison,* as even the State appears to recognize (Opp. 15).

Most fundamentally, though, the State's argument simply misconstrues Petitioners' Commerce Clause claim—the "commerce" involved here is *fishing*, not fish, and the Commerce Clause protects the interstate provision of both "goods" like fish, and "services" like fishing. The Court has "long noted the applicability of [its] dormant Commerce Clause jurisprudence to service industries." *Camps Newfound/Owatonna v. Town of Harrison*, 520 U.S. 564, 577 n.10 (1997) (citing cases); *see also, e.g., C&A Carbone, Inc. v. Clarkstown*, 511 U.S. 383, 391 (1994) ("the article of commerce is not so much the solid waste itself, but rather the service of processing and disposing of it"). The Commerce Clause is applicable to the Alaska license-fee scheme not because "nonresident fishers *eventually* engage in commercial activity" by selling harvested fish (Opp. 13), but because the activity of fishing is itself an interstate commercial activity: Nonresident fishers cross state lines to pursue a commercial activity in Alaska, and that interstate movement in pursuit of commercial ends renders the Commerce Clause fully applicable—and highly relevant—to the Alaska license-fee scheme. *Compare Camps Newfound/Owatonna*, 520 U.S. at 573 (interstate movement of out-of-state campers who sought to attend Maine charitable camp constitutes commerce); *Edwards v. California*, 314 U.S. 160, 172 (1941) ("[I]t is settled beyond question that the transportation of persons is 'commerce' within the meaning" of the Commerce Clause). The movement of nonresident commercial fishermen into Alaska to harvest fish is at least as "commercial" as the movement

of nonresident campers attending Camps Newfound/Owatonna into Maine.

That said, the State does not even address the central question presented by the petition—whether discrimination based on residency is cognizable under the Privileges and Immunities Clause alone, and not the Commerce Clause, as the Alaska court held. Pet. App. 62a-63a. Petitioners showed (Pet. 16) that this Court has already suggested, just last Term, that a challenge by nonresidents to California's milk pricing and pooling regulations is cognizable under *both* Clauses. *Hillside Dairy, Inc. v. Lyons*, 123 S. Ct. 2142 (2003). The State does not even mention *Hillside Dairy*, much less try to distinguish it, and it cites no authority for the remarkable proposition that a state law that discriminates against nonresidents who seek to engage in commerce within the state implicates only the Privileges and Immunities Clause.

Alaska similarly fails to address the implications of the Alaska court's ruling for out-of-state corporations that purchase commercial fishing licenses on behalf of employees. *See* Pet. 17. Because the Privileges and Immunities Clause provides no protection against discrimination for corporations, *see Paul v. Virginia*, 75 U.S. (8 Wall.) 168, 180-82 (1868), *overruled in part on other grounds*, *United States v. South-Eastern Underwriters Ass'n*, 322 U.S. 533 (1944), the Alaska Supreme Court's holding would leave nonresident corporations constitutionally defenseless against patent local protectionism. The State's inability to answer this question demonstrates both the constitutional error and the need for this Court's review.

3. **The Alaska Supreme Court's Privileges and Immunities Clause holding warrants this Court's review.** The Alaska Supreme Court's conclusion that a discriminatory fee can be justified under the Privileges and Immunities Clause so long as the discrimination satisfies a prolix mathematical formula—which in turn depends upon

an ongoing calculation of the State's budget generated by the State and given almost complete deference by the courts—flies in the face of established jurisprudence. This Court has repeatedly held that expenditures from a state's general revenues cannot be used to justify discrimination against nonresidents under the Commerce Clause. *See, e.g., Oregon Waste Sys., Inc. v. Dep't of Envtl. Quality*, 511 U.S. 93, 105 n.8 (1994); *Fulton Corp. v. Faulkner*, 516 U.S. 325, 335 (1996).

The State does not dispute this principle; instead, it asserts that the rule of *Fulton Corp.* and *Oregon Waste Systems* is strictly confined to discriminatory taxes challenged under the Commerce Clause. A discriminatory fee analyzed under the Privileges and Immunities Clause, the State insists, is allowable so long as it does nothing more than equalize the burdens otherwise borne by state residents via expenditures from the state's (here, oil-derived) revenues, based on dictum (which the State erroneously describes as a "holding," Opp. at 15) in *Toomer*, 334 U.S. at 398-99. But the State offers no principled reason—much less any authority—for the rigid distinction it draws between the two Clauses, and it pays only lip service to this Court's longstanding recognition that the Clauses share a "common origin" and enjoy a "mutually reinforcing relationship." *Hicklin v. Orbeck*, 437 U.S. 518, 531-32 (1978). Nothing in the State's Opposition explains, or justifies, the Alaska court's decision to authorize a discriminatory fee under the Privileges and Immunities Clause that could not possibly survive scrutiny under this Court's "compensatory tax" Commerce Clause jurisprudence.

Here again, the State studiously avoids the significant issues raised by the petition, including the questions whether the Alaska Supreme Court overreached when it treated expenditures from the State's oil revenues as "analytically . . . equivalent" (Pet. App. 106a) to "taxes which only residents pay," *Toomer*, 334 U.S. at 399, *see* Pet. 22; whether the narrow category of enforcement and

conservation costs that the *Toomer* dictum suggested could be taken into account in assessing differential fees against nonresidents should be read so broadly as to include the generalized costs of state government encompassed by the *Carlson III* calculation of the State's fisheries budget, *see* Pet. 24-25; and whether the leeway given the State to calculate and submit for the court's exceedingly deferential review its own "fisheries budget" provides an open invitation to state governments to favor in-state commercial interests at the expense of out-of-state competitors, *see* Pet. 26. Alaska's refusal to confront these questions highlights rather than minimizes the need for this Court's intervention.

In a last-ditch effort to avoid review, the State claims (Opp. 19) that the nonresident differential should not be considered analogous to a tax, but rather is more akin to a "user fee" imposed by the State for access to the State's fishing waters. Even assuming that the Alaska license charge could be considered a "user fee," a theory not adopted by the Alaska Supreme Court, that would not save the Alaska scheme. For one, user fees *are* reviewable under the Commerce Clause. For another, this Court has repeatedly held that user fees are constitutionally permissible only so long as they are nondiscriminatory: "[E]ven if [a] surcharge could somehow be viewed as a user fee, it [cannot] be sustained [if] it discriminates against interstate commerce." *Oregon Waste,* 511 U.S. at 103-04 n.6. Even a case cited by the State (Opp. 19 nn.10 & 11), *Evansville-Vanderburgh Airport Auth. Dist. v. Delta Airlines, Inc.*, 405 U.S. 707, 717 (1972), held that a one-dollar airplane boarding fee was allowable under the Commerce Clause only because the fee did not "discriminate[] against interstate commerce and travel": "both interstate and intrastate flights are subject to the same charges." *See also Am. Trucking Ass'ns v. Scheiner*, 483 U.S. 266, 290 (1987) (finding Pennsylvania marker fee and axle tax invalid in part because taxes "discriminate[d] against out-of-state vehicles by subjecting them to a much higher charge per mile traveled in the

State"). Because the Alaska fishing-license-fee scheme discriminates, on its face, against nonresidents, it cannot be sustained even under the rubric of a "user fee."

## CONCLUSION

For these reasons, as well as those stated in the petition, certiorari should be granted.

Respectfully submitted,

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September 22, 2003